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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

OREGON & CALIFORNIA RAILROAD COMPANY ET AL.,

Appellants.

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

CONSTANTINE J. SMYTH,
Special Assistant to the Attorney General.

HOGAN LINOTYPING CO., OMAHA

CONTENTS.

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STATEMENT.

The general question presented by this appeal is whether the decree of the lower court conforms to the mandate of the Supreme Court, the concluding paragraph of whose opinion reads thus:

> "Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion" (35 S. C. R. 926).

To determine this question we must examine the opinion. The following excerpts illustrate it. [Italics wherever they apear are mine.]

This is the opening sentence:

> "A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction" (Id. 916).

Then the respective claims of the parties are given:

> "The government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent, and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complaintants insist that a trust was created for actual settlers, and the intervenors urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands" (Id. 916).

Speaking of an admission made by some of the defendants, it is said:

> "They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required

and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are *laws* as well as grants, and must be given the exactness of laws.

If the provisos were ignorantly adopted, as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the timber and stone act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is a controversy about all of the asserted facts and conclusions.

Our conclusion, then, on the contentions of the government and the railroad company, are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company'' (Id. 920).

Denying the right of the defendants to urge an estoppel, the court said:

''No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and *immunity* from their responsibility'' (Id. 921).

In another place the opinion reads:

> "We may observe *again* that the acts of Congress are *laws* as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed" (Id. 922).

Again:

> "The character of the lands furnished no excuse. It might have justified nonaction, but it did not justify antagonistic action" (Id. 922).

The court introduces its discussion of the rights of the cross complainants and interveners by saying:

> "The provisos of the act having been thus established as covenants, not conditions subsequent, between the government and the defendants, and their *continuing* obligation determined, we are brought to a consideration of the rights of the cross complainants and interveners thereunder" (Id. 923).

After disposing of the claims of the cross petitioners and interveners adversely to them, the court returns to the controversy between the government and the railroad companies:

> "In conclusion, we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. *Judgment* is independent of them. It is determined by the *simple words* of the acts of Congress, not only regarded as grants, but as *laws,* and accepted

as both; granting rights, but imposing obligations, —rights quite definite, obligations as much so" (Id. 925).

Further on it is said:

"We can *only* enforce the provisos *as written, not relieve* from them."

Then follows this:

"Rejecting, then, the contention of the government and the contentions of the cross complainants and interveners, and regarding the settlers' clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the district court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits" (Id. 925).

Again:

"In view of such disregard of the covenants, and *gain* of *illegal emolument,* and in view of the government's interest in the *exact* observance of them, it might seem that *restriction* upon the future conduct of the railroad company and its various agencies is imperfect relief" (Id. 925).

Further on it is said:

"However, an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the government" (Id. 925).

Later on this occurs:

"It is, however, clear, even from the govern-

ment's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the *timber* which is upon them'' (Id. 926).

The court then gives its final conclusion upon the whole case:

''This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged *disregard* of the *covenants by the railroad company,* the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the *timber* thereon, and from cutting or authorizing the cutting or removal of any of the *timber* thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its *discretion* may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion'' (Id. 926).

ARGUMENT.

The Decree of the Lower Court is in Exact Accord With the Mandate of the Supreme Court.

Shortly after the Supreme Court had handed down its opinion, counsel for the defendants sent to the Clerk of the Supreme Court a pamphlet which they denominated "Petition of defendants and appellants * * * for modification of opinion rendered." In support of the petition they said:

> "Nor, we submit, could it be questioned that the grantee would be authorized to remove stone from the lands * * * and if all this be true there is no reason apparent to us upon the face and terms of the statute why the right of the grantee in a like way to make use of the timber upon the land should be differentiated" (p. 7).

Again:

> "But the removal of the timber upon this land would not go in defeat of the settlement policy of the act, but would be directly in aid of such policy" (p. 9).

In a speech delivered at Salem, Oregon, to a large body of citizens called to consider the opinion of the Supreme Court, one of counsel for the defendants stated in substance that there was nothing in the opinion which prohibited the railroad company from disposing of the timber on the land, or the stone or other minerals that might be found in it, and this theory was given wide circulation.

It was believed by the government that there was no warrant in the opinion of the Supreme Court for such a theory, and therefore it was deemed wise to make the decree specific upon that point, always keeping it, of course, within the terms of the mandate.

That which was granted by the two granting acts to the railway companies was "land." The opinion speaks of it as "land." The term "land"—

> "Includes not only the face of the earth, but everything under it or over it, and has in legal signification an indefinite extent upward and downward."
>
> (32 Cyc., 655, Higgins Oil Co. v. Snow, 113 Fed., 433.)

Washburn, in his work on Real Property, says:

> "Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that '*cujus est solum, ejus est usque ad caelam*' in one direction, and '*usque ad orcum*' in the other" (1 Washb. Real Property, 3).

Therefore, the word "land," as used in the granting acts and in the opinion of the Supreme Court, embraces not only the surface but the trees growing thereon and the minerals beneath the surface. When the granting acts say that "the lands granted by the act aforesaid shall be sold to actual settlers only," it means that the minerals and the trees, as well as the surface, shall be sold to actual settlers only. It does not contemplate that they shall be sold apart, but as

one, and by the acre, for the proviso further declares that the sale shall be not only to actual settlers but also "in quantities not greater than one quarter section to one purchaser and for a price not exceeding $2.50 per acre."

How could the trees be sold to an actual settler who did not at the same time acquire a right to the surface? How could minerals be sold to an actual settler who did not at the same time have a right to the surface? It is clearly within the contemplation of the restrictive proviso just quoted that the actual settler shall have title to all above as well as all beneath the surface.

If the railroad company could sell the timber on 160 acres of land for $10,000—and there are many quarter sections which contain timber of that value—to one person, while disposing of the surface of the land to another person, an actual settler, for $2.50 an acre, would it not be receiving more than $2.50 an acre for the land? Yet that is all it was entitled to receive under the terms of the grants. The opinion in no place gives countenance to any other view. It says in its opening sentence that—

> "A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction" (35 S. C. R. 916).

This means that the provisos mentioned are plain and easily understood.

In another place the opinion says:

> "The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. * * * It is to be *remembered* the *acts* are *laws* as well as grants, and must be given the exactness of laws" (Id. 920).

The term "$2.50 an acre" means $2.50 an acre and no more.

In other words, to paraphrase the language of Mr. Justice Holmes, the granting acts are to be taken to mean what they fairly convey to a dispassionate reader "by a fairly exact use of English speech" (196 U. S., 375-395).

In another place the opinion says that the judgment of the court is to be determined—

> "By the *simple words* of the acts of Congress not only regarded as grants but as *law,* and accepted as both."

Again:

> "We can only enforce the provisos *as written, not relieve from them"* (Id. 925).

From these excerpts it is very clear that the grantees are prohibited by the restrictive provisos from obtaining more for the land than $2.50 an acre and that they must sell it to actual settlers only. Moreover, if the appellants' view of the opinion be correct, there would be no violation of the restrictive proviso by sell-

ing the timber on each 160 acres at ten, twenty, or fifty dollars an acre, provided it is not sold to an actual settler. If this be so, it is more than likely that appellants never violated the granting act, for it may well be doubted whether they ever received more than $2.50 an acre for the use of the surface of the land. What a monstrous mistake, then, has been made by the court and counsel! Defendants' contention seems to be that the restrictive provisos do not apply to the timber on the land or the minerals beneath the surface, but only to the disposition of the surface apart from the timber and the mineral. We repeat there is no warrant for such an interpretation of the "simple words" of the grants.

But when we come to consider the directions of the Supreme Court with respect to the restraints which should be placed upon the appellants, we see clearly that their contention rests upon an unsound foundation. Whatever doubt may have existed before must disappear in the presence of those instructions. First, the defendants are forbidden to make sales of the lands "in violation of the covenants." That is, they must not sell them for more than $2.50 an acre to any person who is not an actual settler or in quantities greater than 160 acres to a single purchaser.

The word "lands," as we have seen, includes the trees and the minerals, as well as the surface. Since the lands cannot be sold to any but an actual settler, then of course neither the trees nor the minerals can be sold to one who is not an actual settler, and in no case can the railroad company exact more than $2.50 an acre.

If the mandate does not apply to the timber, why did the Supreme Court direct an injunction against "any disposition * * * of the timber thereon" and against "cutting or authorizing the cutting or removal of any of the timber thereon?" Because the court treated the timber as a part of the land, just as the mineral must be treated. No other view finds any support either in the granting acts, the opinion of the court, or general law.

The defendants in their petition to the Supreme Court for a modification of the opinion refer to Reeves on Real Property, Sec. 423, wherein it is said:

> "*Subject to any restrictions* under which he may have taken it, and subject also to the mandate of the maxim *sic utere tuo ut alienum non laedas*, its owner when in possession may use it" (the land) "for any purpose and in any manner that he may choose; he may cut timber, open and work mines, cultivate the soil even to exhaustion" (p. 9).

This text is also referred to on p. 41 of their brief on this appeal.

Note the opening words, "Subject to any restrictions." The restrictions here are found in the enforceable covenant, and the right of the defendants in the lands is limited by them.

The terms "land," we repeat, embraces trees and minerals.

Consequently, when in the second paragraph of the decree the *lower* court restrains the defendants from disposing of the trees or the minerals apart from

the lands, it was well within the mandate which forbade the disposition of the lands to any but an actual settler.

In the brief of the Union Trust Company it is urged (p. 6) that—

> "If the defendants are restrained from selling the timbers apart from the land, that part of the land which is timbered but not susceptible of 'actual settlement,' can never be sold by the railroad company in honest compliance with the covenants as construed by the Supreme Court."

This is only a restatement of the argument based on the character of the land and urged by the defendants in the Supreme Court. To it the court replied:

> "If but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest * * * the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law. They were neither cause nor justification for violating it" (p. 920).

The application is obvious. Nothing need be added.

Actual Settlers.

Complaint is made because the phrase "actual settler" is qualified by the words "on the land sold to him." Clearly this is what is meant by the proviso which says that the land shall be sold to actual settlers. It does not mean actual settlers on other lands, but on the land bought.

The Money on Deposit.

The money mentioned takes the place of timber sold and land condemned subsequent to the commencement of the suit. By agreement of the parties, the trial court directed that the money be placed on deposit to await the final outcome of the litigation. If the land and timber for which the money was substituted might not be disposed of pending legislation by Congress, then, of course, the money should also remain intact until Congress should have an opportunity to act. This must be clear. The purpose of the opinion is to hold everything pertaining to the grant in *statu quo* until Congress has had a reasonable opportunity to make provision for the disposition of the whole subject.

The Discretion of the Court in Modifying the Temporary Injunction.

The Union Trust Company in its brief says:

> "The court did not intend to give the District Court discretion to continue the injunction indefinitely, because that would be in effect to make the rights of the parties depend not upon the law of the land but upon the discretion of the judge in terminating or continuing the injunction" (p. 15).

But the Supreme Court did commit the matter to the discretion of the court, for it says:

> "The defendants may apply to the District Court within a reasonable time for a modification * * * of the injunction * * * and the court in its *discretion* may modify the decree accordingly" (p. 926).

The decree, then, is in harmony with the mandate.

Other Reservations by the Court.

The opinion of the Supreme Court reserves to the government all rights or remedies which it might have "by law or under the joint resolution of April 13, 1912, *supra,* or under the act of Congress passed August 20, 1912, *supra,*" against the defendants on account of the sold lands (p. 925).

The sixth provision of the decree expresses this reservation.

The Costs.

The mandate directs a general reversal of the lower court's decree. This put the case where it was before the decree had been entered. Thereupon the lower court, in obedience to the mandate, entered a new decree in favor of the complainant and against the defendants upon the record as it had been made.

Suppose the trial court in the first instance, instead of entering a decree declaring a forfeiture, had entered such a decree as the mandate required. Would there be any doubt about the complainant's right to costs? Surely not. It had prevailed, and the prevailing party is always entitled to recover his costs unless there be some valid reason appealing to the sound discretion of the court for not allowing them.

This court in Tyler Min. Co. v. Sweeney, 79 Fed., 281, said:

> "In equity cases and in other cases where there are no statutory provisions or rules of practice, the award of costs, as well as the taxation thereof, rests in the sound discretion of the trial court and could not be reviewed in the appellate court except in cases of a manifest abuse of such discretion."

This discretion, of course, is a judicial discretion, not an arbitrary one. Is there any reason in this case why the appellants should not be compelled to pay the complaint its costs? The illegal action of the defendants forced the complainant to go into court for relief. It plead the granting acts—the law—and showed that they had been violated by the defendants. This the latter denied. In consequence of the denial much testimony was taken. The court found that the granting acts had been violated, that, in the language of the Supreme Court, the railroad company was guilty of a "prolonged disregard of the covenants." Where, then, is there any equitable cause for relieving the law breaker from the consequence of its acts?

Appellants place themselves on the proposition that the Supreme Court did not order them to pay costs. When it directed the lower court to enter a decree in accordance with the opinion it impliedly directed that court to award costs in accordance with the usual rules of equity. Hence the court was within its rights in directing that the defendants, the losing parties, should pay the costs.

In the brief filed on behalf of the railroad companies and Gage, we read (p. 58):

> "It should excite some surprise that the government, defeated in its principal contention, should come to the court of first instance and ask that these appellants be penalized in costs because they substantially prevailed on the turning point of the case."

This is rather startling. True, the government was defeated in its contention that the restrictive provisos constituted a condition subsequent. But what about the insistence, often repeated, of the appellants that the restrictive provisos were "unenforceable covenants?" (35 S. C. R. 916).

Assuming that the value of the land "exceeds thirty millions" as stipulated, how stands the result of the contest? The government claimed all. So did the railroad companies. The judgment of the Supreme Court is that the railroad companies are entitled to $4,750,000, or $2.50 an acre, for the land involved, 2,300,000 acres, and the government to the remainder, or $25,250,000. Does this indicate that the government was "defeated" and that appellants "substantially prevailed?" We pause for an answer. No, the government succeeded, and is entitled to its costs.

Refusals of the Trial Court.

Assignments of error marked 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, are based upon the failure of the court below to decree certain things enumerated therein. Insofar as those things are in conflict with what it did decree they should not have been granted, but insofar as they are not,

even if they were proper under any circumstances—which they were not—no request was made for their incorporation in the decree.

This is revealed at once by an inspection of the draft of decree presented by the defendants (R. pp. 36-37), but as we have said, it would not have been proper for the court to have placed any of them in the decree. To do so would have been to go outside of the terms of the mandate.

The decree of the lower court obeys in every particular the directions of the Supreme Court, and therefore should be affirmed.

Respectfully submitted,

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